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Attorneys for Plaintiffs/Counter-Defendants, LARGO CONCRETE,  
 INC. and N.M.N. CONSTRUCTION, INC.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

LARGO CONCRETE, INC., a California  
 Corporation; N.M.N. CONSTRUCTION, INC., a  
 California Corporation.

Plaintiffs,

v.

LIBERTY MUTUAL FIRE INSURANCE  
 COMPANY, a Massachusetts Corporation, and  
 DOES 1 through 100, inclusive.

Defendants.

AND RELATED COUNTERCLAIM

Case No. C07-04651 CRB (ADR)  
*The Hon. Charles R. Breyer*

**DECLARATION OF MICHAEL L. PHILLIPS  
 IN SUPPORT OF *EX PARTE* APPLICATION  
 FOR:**

- 1) STAY OF ALL PROCEEDINGS  
 PENDING DISPOSITION OF LARGO'S  
 PETITION FOR WRIT OF MANDAMUS;  
 and**
- 2) RULINGS ON LARGO'S OBECTIONS  
 TO EVIDENCE PRESENTED BY LMF IN  
 SUPPORT OF ITS MOTION TO  
 DISQUALIFY ROXBOROUGH,  
 POMERANCE & NYE**

**[*Ex Parte* Application Filed and Served  
 Concurrently Herewith]**

Complaint filed: September 10, 2007

I, MICHAEL L. PHILLIPS, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am an associate with  
 Roxborough, Pomerance & Nye LLP, attorneys of record for the plaintiff Largo Concrete, Inc. and  
 plaintiff and counter-defendant N.M.N. Construction, Inc. (collectively "Plaintiffs"). I have personal  
 knowledge of the facts set forth below and, if called and sworn as a witness, could and would testify  
 competently thereto.

2. On January 29, 2008 I notified counsel for Liberty Mutual Fire Insurance of Largo's intent to file an *Ex Parte* application with this Court seeking a stay of all proceedings pending the disposition of Largo's Petition for Writ of Mandamus and rulings on Largo's objections to evidence presented by LMF in support of its motion to disqualify Roxborough, Pomerance & Nye LLP from representing Largo in this matter. Attached as Exhibit "A" is a true and correct copy of correspondence dated January 29, 2008 sent via email to counsel for LMF containing the above notice.

3. Attached hereto as Exhibit “B” is a true and correct copy of the Memorandum and Order Re: Motion to Disqualify executed by this Court on December 31, 2007 and served electronically on January 2, 2008.

I declare under perjury, pursuant to the laws of the United States of America, that the foregoing is true and correct.

Executed this 29<sup>th</sup> day of January, 2008 at Woodland Hills, California.

  
MICHAEL L. PHILLIPS

**EXHIBIT A**



**ROXBOROUGH  
POMERANCE  
& NYE, LLP**

5820 CANOGA AVENUE, SUITE 250  
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NICHOLAS P. ROXBOROUGH  
DREW E. POMERANCE  
GARY A. NYE  
MICHAEL B. ADREANI

CRAIG S. PYNES  
DAVID R. GINSBURG  
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MARINA N. VITEK  
ERIN M. LABRACHE  
MICHAEL H. RAICHELSON  
MICHAEL L. PHILLIPS  
ANTHONY S. KHOURY  
GIOVANNI ORANTES

DAMON M. RIBAKOFF\*  
(1970-2007)

January 29, 2008

**VIA FACSIMILE AND E-MAIL**

Scott Sveslosky, Esq.  
**SHEPPARD MULLIN RICHTER & HAMPTON, LLP**  
333 South Hope Street, Forty-Eighth Floor  
Los Angeles, CA 90071

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LOS ANGELES OFFICE  
10866 WILSHIRE BLVD., SUITE 1550  
LOS ANGELES, CA 90024-4336  
PHONE: (310) 470-1869  
FAX: (310) 470-9648

Re: Largo Concrete v. Liberty Mutual

Dear Mr. Sveslosky:

This letter is to notify you that Largo will be filing an *Ex Parte* application with the Court today seeking a stay of proceedings in this matter pending disposition of Largo's Petition for Writ of Mandamus seeking reversal of the District Court's granting of Liberty's motion to disqualify Roxborough, Pomerance & Nye from representing Largo in this matter. It is my understanding the Application will be deemed submitted on the papers unless the Court orders a hearing.

Please do not hesitate to contact me or Nicholas Roxborough should you wish to discuss this matter.

Very truly yours,

ROXBOROUGH, POMERANCE & NYE LLP

MICHAEL L. PHILLIPS

MLP:ks  
File No.: 07030.02

cc: Nicholas P. Roxborough, Esq.

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\*\*\* TX REPORT \*\*\*  
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**F A X**

To: Scott Sveslosky, Esq.

**SHEPPARD MULLIN RICHTER & HAMPTON, LLP**

Fax number: (213) 620-1398

From: Michael L. Phillips, Esq.

Date: **January 29, 2008**

Number of Pages, including cover sheet: 2

Regarding: *Largo Concrete v. Liberty Mutual*

**Comments: Please see attached correspondence dated January 29, 2008.**

## Kimberly Schwarz

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**From:** Michael L. Phillips [mlp@rpnlaw.com]  
**Sent:** Tuesday, January 29, 2008 9:50 AM  
**To:** 'Scott Sveslosky'; 'Frank Falzetta'  
**Cc:** 'Kimberly Schwarz'  
**Subject:** Largo v. Liberty

Gentlemen-

Please see the attached correspondence.

Sincerely,

**Michael L. Phillips, Esq.**  
**ROXBOROUGH, POMERANCE & NYE, LLP**  
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# **EXHIBIT B**

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 LARGO CONCRETE, INC., et al.,

No. C 07-04651 CRB

12 Plaintiffs,

**MEMORANDUM AND ORDER RE:  
MOTION TO DISQUALIFY**

13 v.

14 LIBERTY MUTUAL FIRE INSURANCE  
15 COMPANY,

16 Defendant.  
17 \_\_\_\_\_/

18 This is an insurance bad faith lawsuit. Plaintiffs allege defendant Liberty Mutual Fire  
19 Insurance Company ("Liberty" or "defendant") mishandled their workers compensation  
20 insurance contracts. For example, they allege that defendant failed to reasonably investigate  
21 and defend claims and failed to deny questionable claims. Plaintiffs are represented by  
22 Roxborough, Pomerance & Nye LLP of Woodlawn Hills, California.

23 Defendant Liberty moves to disqualify the Roxborough firm on the ground that one of  
24 Roxborough's associates performed legal work for Liberty on a workers compensation bad  
25 faith action and on other insurance bad faith actions while the associate was employed at a  
26 different firm. After carefully considering the papers filed by the parties, and having had the  
27 opportunity for oral argument, defendant's motion to disqualify is GRANTED.  
28 //



**BACKGROUND**

Craig S. Pynes has been employed as an associate at Roxborough since March 2004. Before joining Roxborough, Pynes practiced for eight or nine months at Kern & Wooley LLP. Kern & Wooley was coverage counsel for the defendant in this action, Liberty Mutual Fire Insurance Company and its affiliates.

According to Lisa Kraslik Hansen, a former Kern & Wooley attorney who supervised Pynes at Kern & Wooley, Pynes “worked almost exclusively on matters for the Liberty companies” on both litigated and non-litigated matters during the time he worked at Kern & Wooley.

Among other cases, Pynes represented Liberty Mutual Insurance Company in Tony’s Fine Foods, Inc. v. Liberty Mutual Ins. Co., in California state court. The plaintiff in Tony’s Fine Foods made allegations nearly identical to those in this action; namely, that Liberty mishandled the plaintiff’s workers compensation insurance contract. Hanson and another then Kern & Wooley attorney, Melodee Yee, both attest in affidavits that on that matter Pynes (1) reviewed Liberty Mutual companies’ workers’ compensation claim files, and (2) conducted a privilege review and prepared a privilege log.

Pynes admits that he briefly worked on Tony’s Fine Foods and that he worked with Michelle Yee on the case, but he denies that he had any contact with attorney Hansen about the case. He describes his work on the matter as that of a paralegal: redacting personal identifying information of the injured workers, such as their social security numbers and telephone numbers.

Defendant has produced an invoice from Kern & Wooley that reveals that Pynes billed time on Tony’s Fine Foods on six different days for a total of 9.8 hours. Pynes’ tasks are described as, among other things: “Fact Investigation/Development–Review underlying file information for various WCAB claims against Tony’s Fine Foods for analysis for document production” and “Continue analyzing claim and other underlying file materials for production (and redaction and segregation of privileged information/documents).”

1 All of Pynes' other work for Liberty entities while employed at Kern & Wooley did  
 2 not involve workers compensation insurance. Such work included attending a mediation on  
 3 Liberty's behalf, drafting discovery responses, and reviewing case files and also included  
 4 legal services on bad faith cases.

### 5 DISCUSSION

6 Motions to disqualify counsel are decided under state law. Ultimately, however, the  
 7 decision to disqualify counsel for conflict of interest is within the trial court's  
 discretion.

8 Under California law the starting point for deciding a motion to disqualify counsel is  
 9 the recognition of interests implicated by such a motion. Courts "must examine these  
 10 motions carefully to ensure that literalism does not deny the parties substantial  
 11 justice." At base, "disqualification motion[s] may involve such considerations as a  
 client's right to chosen counsel, an attorney's interest in representing a client, [and]  
 the financial burden on a client to replace disqualified counsel." Ultimately, however,  
 a court must maintain ethical standards of professional responsibility.

12 Hitachi, Ltd. v. Tatung Co., 419 F.Supp. 1158, 1160-61 (N.D. Cal. 2006). The Court's  
 13 "paramount concern must be to preserve public trust in the scrupulous administration of  
 14 justice and the integrity of the bar. The important right to counsel of one's choice must yield  
 15 to ethical considerations that affect the fundamental principles of our justice process."

16 People ex. rel. Dep.t of Corporations v. Speedee Oil Change Systems Inc., 20 Cal.4th 1135,  
 17 1145 (1999).

18 The California Rule of Professional Conduct at issue on this motion provides:

19 A member shall not, without the informed written consent of the client or  
 20 former client, accept employment adverse to the client or former client where,  
 21 by reason of the representation of the client or former client, the member has  
 obtained confidential information material to the employment.

22 California Rules of Professional Conduct R. 3-310(E).

23 Disqualification of an attorney from undertaking representation adverse to a  
 24 former client does not require proof that the attorney *actually* possesses  
 confidential information. Rather, in applying rule 3-310(E) [California] courts  
 25 have utilized the "substantial relationship" test: "When a substantial  
 26 relationship has been shown to exist between the former representation and the  
 current representation, and when it appears by virtue of the nature of the former  
 representation or the relationship of the attorney to his former client  
 27 confidential information material to the current dispute would normally have  
 been imparted to the attorney . . . , the attorney's knowledge of confidential  
 28 information is presumed."

1 Adams v. Aerojet-General Corp., 86 Cal.App.4th 1324, 1331 (2001) (internal citations  
2 omitted); see also Speedee Oil Change Systems Inc., 20 Cal.4th at 1146 (“Where an attorney  
3 successively represents clients with adverse interests, and where the subjects of the two  
4 representations are substantially related, the need to protect the first client’s confidential  
5 information requires that the attorney be disqualified from the second representation.”).  
6 “This is the rule by necessity, for it is not within the power of the former client to prove what  
7 is in the mind of the attorney. Nor should the attorney have to ‘engage in a subtle evaluation  
8 of the extent to which he acquired relevant information in the first representation and of the  
9 actual use of that knowledge and information in the subsequent representation.” Global Van  
10 Lines, Inc. v. Superior Court, 144 Cal.App.3d 483, 489 (1983).

11 “In determining whether there is a substantial relationship between the former and the  
12 current representation, the Court looks to the ‘practical consequences of the attorney’s  
13 representation of the former client’ and considers ‘whether confidential information material  
14 to the current dispute would normally have been imparted to the attorney by virtue of the  
15 nature of the former representation.’” I-Enterprise Co. LLC v. Draper Fisher Jurvetson  
16 Management Co., 2005 LEXIS 45190 (N.D. Cal. April 4, 2005) (citations omitted). In so  
17 doing, the Court inquires into the similarities between the two factual situations, the legal  
18 questions posed, and the nature and extent of the attorney’s involvement with the cases,  
19 including the attorney’s time spent on the earlier case, the type of work performed, and the  
20 attorney’s possible exposure to strategy or policy. See Morrison Knudsen Corp. v. Hancock,  
21 Rothert & Bunshoft, 69 Cal.App.4th 223, 234 (1999).

22 **A. Pynes has a conflict under the substantial relationship test**

23 The substantial relationship test is satisfied here. First, Tony’s Fine Foods is factually  
24 similar to the lawsuit before this Court: a lawsuit accusing Liberty of mismanaging its  
25 workers compensation claims handling process.

26 Second, according to the billing invoice, Pynes reviewed workers compensation  
27 claims files for a privilege review and prepared a privilege log; indeed, he does not deny that  
28 he did so. The Court finds that billing invoice is the best and most reliable evidence of the

1 nature of the work Pynes performed. An attorney is possibly exposed to strategy or policy  
2 along with confidential information when reviewing documents for privilege—that is, for  
3 confidentiality-- and preparing a privilege log.

4 Third, the information Pynes would have gleaned from reviewing claims files and  
5 preparation of a privilege log is most likely material to this action which is nearly identical to  
6 Tony's Fine Foods—the only real difference is the name of the plaintiff. Thus, Pynes'  
7 knowledge of confidential information is presumed. Adams, 86 Cal.App.4th at 1331.

8 Plaintiffs' first response is that defendant has not satisfied the test because the  
9 defendant in Tony's Fine Foods was Liberty Mutual Insurance Company and the defendant  
10 here is Liberty Mutual *Fire* Insurance Company--two separate entities. The evidence in the  
11 record, however, demonstrates that both companies underwrite workers compensation  
12 policies and the same Liberty employees adjust claims and service policies for both  
13 companies. The two companies use the same claims handling guidelines and the same in-  
14 house lawyers handle bad faith matters for both companies. Even Pynes testified at his  
15 deposition that he treated all the Liberty entities as the same company. The different names  
16 are a distinction without a difference in the context of this motion.

17 Next, plaintiffs argue that the Court should apply the "modified substantial  
18 relationship" test. That test, however, only applies when the lawyer with the alleged conflict  
19 never provided any legal services to the client in a substantially related matter or otherwise.  
20 In Adams, for example, the question presented was what test to apply when the lawyer with  
21 the alleged conflict never personally performed any legal services for the client; instead, the  
22 conflict arose from the lawyer's former law firm's representation of the client in a  
23 substantially related matter. 86 Cal.App.4th at 1328. The court held that if the lawyer  
24 himself had been personally involved with his former firm's work for the client  
25 disqualification would have been required. Id. at 1332. The lawyer, however, had not;  
26 accordingly, the court held that

27 where there is a substantial relationship between the current case and the  
28 matters handled by the firm-switching attorney's former firm, but the attorney  
did not personally represent the former client who now seeks to remove him  
from the case, the trial court should apply a modified version of the



1 “substantial relationship” test . . . . The court’s task, under these circumstances,  
2 is to determine whether confidential information to the current representation  
3 would normally have been imparted to the attorney during his tenure at the old  
4 firm.

5 Id. at 1340. The court also placed the burden on the allegedly conflicted lawyer to show that  
6 he had not been exposed to confidential information:

7 Finally, in light of the paramount importance of maintaining the inviolability of  
8 client confidences, where a substantial relationship between the former firm’s  
9 representation of the client and the current lawsuit has been shown (as is the  
10 case here), the attorney whose disqualification is sought should carry the  
11 burden of proving that he had no exposure to confidential information relevant  
12 to the current action while he was a member of the former firm. That burden  
13 requires an affirmative showing and is not satisfied by a cursory denial.

14 Id. at 1340-41.

15 In Ochoa v. Fordel, 146 Cal.App.4th 898 (2007), the case upon which plaintiffs rely,  
16 the allegedly conflicted lawyer similarly did not bill for any legal services to the client  
17 moving to disqualify; instead, his former firm represented the client (while the lawyer was  
18 with the firm). The court held that the modified substantial relationship test articulated in  
19 Adams applied and affirmed the trial court’s factual determination that the attorney had met  
20 his burden of proving that he was not exposed to confidential information relevant to the  
21 current action while he was a member of his former firm. Id. at 907-12.

22 Neither Adams nor Ochoa applies here. Liberty is not arguing that plaintiffs’ counsel  
23 should be disqualified because Pynes worked at a firm that performed substantially related  
24 legal services for Liberty; rather, it contends that *Pynes* performed such legal services. The  
25 traditional substantial relationship test applies in such a situation and, as is explained above,  
26 under that test Pynes has a conflict.

27 Finally, plaintiffs emphasize Pynes’ testimony that he did not review anything that  
28 would be of use in this case. The whole point of the presumption, however, is that a court  
does not inquire into the factual particularities of the information conveyed. Nor does a court  
“engage in a balancing of equities’ between the former and current clients. The rights and  
interests of the former client will prevail.” H. F. Ahmanson & Co. v. Salomon Brothers, Inc.  
229 Cal.App.3d 1445, 1451 (1991). It is thus no surprise that plaintiffs have not cited a  
single case in which the presumption and disqualification did not apply to a lawyer who

1 reviewed and redacted documents for confidential information in a substantially related  
2 matter.

3 **B. Vicarious disqualification**

4 Pynes has not worked on this matter for plaintiffs and the Roxborough firm has  
5 erected an "ethical wall." The question, then, is whether the Roxborough firm is nonetheless  
6 vicariously disqualified. This Court held in Hitachi that California law rejects ethical walls.  
7 419 F.Supp.2d at 1164. Plaintiffs do not cite any case decided since Hitachi that casts doubt  
8 on this holding; to the contrary, since the Court's opinion the California Supreme Court has  
9 again rejected an ethical wall, albeit in the context of the San Francisco City Attorney. City  
10 and County of San Francisco v. Cobra Solutions, 38 Cal.4th 839 (2006). Accordingly, as a  
11 result of Pynes' conflict, the Roxborough firm is disqualified from representing plaintiffs in  
12 this matter.

13 **CONCLUSION**

14 For the reasons stated above, defendant's motion to disqualify plaintiffs' counsel is  
15 GRANTED. The Court therefore need not address whether Pynes' other bad faith work for  
16 Liberty involved substantially related matters.

17 **IT IS SO ORDERED.**

18 Dated: December 31, 2007

19 CHARLES R. BREYER  
20 UNITED STATES DISTRICT JUDGE  
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**PROOF OF SERVICE**

STATE OF CALIFORNIA                     )  
   )  
 COUNTY OF LOS ANGELES                ) ss

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 5820 Canoga Avenue, Suite 250, Woodland Hills, California 91367.

On **January 29, 2008**, I served the foregoing documents described as:

**DECLARATION OF MICHAEL L. PHILLIPS IN SUPPORT OF *EX PARTE* APPLICATION FOR: 1) STAY OF ALL PROCEEDINGS PENDING DISPOSITION OF LARGO'S PETITION FOR WRIT OF MANDAMUS; and 2) RULINGS ON LARGO'S OBECTIONS TO EVIDENCE PRESENTED BY LMF IN SUPPORT OF ITS MOTION TO DISQUALIFY ROXBOROUGH, POMERANCE & NYE**

on the interested party(ies) in this action listed below:

Frank Falzetta, Esq.  
 Scott Sveslosky, Esq.  
**SHEPPARD MULLIN RICHTER &  
 HAMPTON LLP**  
 333 South Hope Street, 48<sup>th</sup> Floor  
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 Tel: (213) 620-1780 | Fax: (213) 620-1398  
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[ssveslosky@sheppardmullin.com](mailto:ssveslosky@sheppardmullin.com)

**ATTORNEYS FOR DEFENDANT**  
**LIBERTY MUTUAL FIRE INSURANCE  
 COMPANY**

- ☒ **BY ELECTRONIC MAIL:** I caused such documents listed above to be transmitted via e-mail to each of the parties on the attached service list at the e-mail address as last given by that person on any document which he or she has filed in this action and served upon this office.
- ☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the offices of the each addressee(s).
- ☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **January 29, 2008**, at Woodland Hills, California.

  
 Kim Schwarz